No. 83-153

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IN THE

Supreme Court of the United States

October Term, 1982

GORDON H. FAULKNER,
JACK DUCKWORTH,
RONALD FREAKE,
DR. JOHN STREFLING,
DR. RODGER SAYLORS,
DR. D. R. REED,
DR. R. J. HOUCK, and
DR. NGHIA MAI,

Petitioners,

vs.

BILLY MERRITT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit has decided erroneously and in a way in conflict with the decisions of other circuits standards for the exercise of the district court's discretion under 28 USC §1915(d), a question which has not been, but should be, settled by this Court.

2. Whether the Seventh Circuit has decided erroneously and in a way in conflict with controlling decisions of this Court that medical malpractice standards are applicable to a civil rights claim.

3. Whether the Seventh Circuit has decided erroneously that there is no discretion under Rule 39(b), Federal Rules of Civil Procedure in cases involving *pro se* prisoner litigants.

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No.

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Petitioners Gordon H. Faulkner, Jack Duckworth, Ronald Freake, Dr. John Strefling, Dr. Rodger Saylors, Dr. D. R. Reed, Dr. R. J. Houck, and Dr. Nghia Mai

respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in Cause Number 81-1136 on January 6, 1983, which reversed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereinafter District Court).

OPINIONS BELOW

The order of the Seventh Circuit issued January 6, 1983, is reported at 697 F.2d 761. A copy of the decision is appended hereto at page A-3. A Petition for Rehearing and Suggestion That It Be Reheard In Banc was denied on March 2, 1983. A copy of the Order is appended hereto at page A-1. A copy of the judgment of the District Court is appended hereto at page A-23. The findings of the District were made orally at the conclusion of the trial. A copy of the transcript of the Court's findings is appended hereto at page A-24.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(a) and (c) of the Rules of this Court to review a judgment of a federal court that is in conflict with the decision of another federal court of appeals on the same matter, that has decided a federal question in a way in conflict with the applicable decisions of this Court and that has decided an important question of federal law which has not been, but should be, settled by this Court.

The judgment of the Seventh Circuit was entered on January 6, 1983. On March 2, 1983, the Seventh Circuit denied the "Petition for Rehearing and Suggestion That It Be Reheard In Banc". Petitioners timely filed a Petition for Enlargement of Time to File Petition for Writ of Certiorari on May 21, 1983. This petition is timely filed in that it is

filed prior to the expiration of the sixty (60) day extension granted by Justice Stevens on May 23, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code Section 42 USC §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Code Section 28 USC §1915(d) provides as follows:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue or if satisfied that the action is frivolous or malicious.

The Eighth Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This petition arises from the reversal on appeal, by the Seventh Circuit, of a judgment by the District Court in the case of *Billy Merritt v. Gordon H. Faulkner, et al.*, Cause Number S80-207, whereby the District Court granted judgment in favor of the Petitioners (defendants in the District Court) and against the Respondent (plaintiff in the District Court) after trial. Jurisdiction in the District Court

was founded upon 42 USC §1983. Jurisdiction in the Seventh Circuit was founded upon 28 USC §1291.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Respondent, a prisoner at the Indiana State Prison, filed suit under 42 USC §1983, alleging that he had been denied adequate medical treatment resulting in blindness, on July 7, 1980 (Rec., p. 3). The Complaint alleged that Respondent had struck himself in the left eye and the next day he went to sick call complaining of blurred vision; that he was seen by the doctor who referred him to the consulting optometrist who in turn referred him to the consulting ophthalmologist; that Respondent was seen repeatedly and regularly by the defendant doctors; that five and one-half months after his accident, Respondent was referred to the Indiana University Medical Center for surgery; that while at the medical center, the ophthalmic surgeons, who were not defendants in this action, operated on his right eye; that Respondent continued to be seen by the defendant doctors and the ophthalmic surgeons; and that he had been scheduled for a second operation but due to an institutional lockdown he had not been allowed to go.

Petitioners filed their Answer on August 7, 1980 (Rec., p. 4). On August 14, 1980 Respondent filed a Motion For Appointment of Counsel, which designated a specific attorney for appointment (Rec., p. 5). On August 26, 1980, Respondent filed a Demand For Jury Trial (Rec., p. 7). On October 1, 1980, the District Court ordered the demand for jury trial to be stricken as untimely and set the case for trial on December 29, 1980 at the Indiana State Prison (Rec., p. 8). Respondent filed a Motion to Reconsider Order under Rule 38, Federal Rules of Civil Procedure, on October 14, 1980, stating that he was blind and relying on lay advocates to assist him (Rec., p. 9). The Motion to Reconsider was denied on October 15, 1980 (Rec., p. 14). On October 30, 1980, Respondent Filed a Motion For Associate Counsel

(Rec., p. 15). That motion was granted on November 3, 1980 and the District Court appointed two lay assistants for Respondent, taking particular note of his blindness (Rec., p. 19). On December 15, 1980 the District Court denied the Motion For Appointment of Counsel (Rec., p. 31).

Trial was held on December 30, 1980. At the conclusion of the trial, the District Court made oral findings and granted judgment for the Defendants (Petitioners herein). The Court found that Respondent had a serious medical problem (Appendix, p. 26); that those things thought to be medically necessary were done and were done promptly (Appendix, p. 26); that Petitioners sent Respondent to a highly regarded medical center and that the recommendations made there were carried out (Appendix, p. 27); that there was no recommendation for any kind of surgery which was not performed (Appendix, p. 28); that there was no deliberate indifference on behalf of Petitioners (Appendix, p. 29; and that Respondent's lay assistants served him well and presented his case in the best possible light (Appendix, p. 29).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Seventh Circuit Has Decided Erroneously and in a Way in Conflict With the Decisions of Other Circuits Standards for the Exercize of the District Court's Discretion Under 28 USC §1915(d), a Question Which Has Not Been But Should be Decided By This Court

The Seventh Circuit has determined that appointment of counsel should be a nearly routine matter in civil rights actions brought by indigent prisoners. In *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), which was decided well after the trial in the instant case, the Seventh Circuit set out five factors which might be considered by a district court in ruling on a motion for appointment of counsel: the merits of

the claim, the nature of the factual issues, whether the only evidence is conflicting, the capability of the indigent to present his case, and the complexity of the legal issues. Yet in its opinion, the Seventh Circuit applies these standards in a way that makes it apparent it believes there is a presumption in favor of appointment of counsel in suits brought by indigent prisoners.

United States Code Section 28 USC §1915(d) provides that a court may request an attorney to represent an indigent plaintiff in civil rights action. The Fourth Circuit and the Ninth Circuit hold that appointment of counsel is required only under *exceptional* circumstances. *Cook v. Bounds*, 518 F.2d 779 (4th Cir. 1975); *United States v. McQuade*, 647 F.2d 938 (9th Cir. 1981). There are no such exceptional circumstances identified in the Seventh Circuit's opinion.

The Seventh Circuit's opinion is rife with sympathy for Respondent who is blind. But his blindness does not warrant appointment of counsel for him. He is in no different position than an illiterate prisoner who needs assistance in researching a case. In fact, Petitioner was in a better position, for he had the assistance of *two* lay advocates. Nor do the *Maclin* considerations make this case an exceptional one.

The Seventh Circuit traces this Court's line of cases requiring appointing of counsel for indigent persons in *criminal* cases and comes to the conclusion that appointment of counsel is necessary in civil lights actions filed by indigent persons. It even goes so far as to state that there is an underlying assumption of our adversarial system that both parties will have roughly equal legal resources, citing *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L.Ed.2d 72 (1977) in which this Court held that the right to access to the courts required the provision of law libraries at correctional institutions. The reasons for appointing counsel in criminal cases differ vastly from those in civil rights actions. A criminal defendant is

fighting for his liberty. If he is successful in his defense, his freedom is his reward. He has nothing to offer in return for his legal services and everything to lose. The prisoner in a civil rights suit is seeking a monetary award from which he can reward his attorney. Or if he is only seeking injunctive relief, 42 USC §1988 provides for the payment of attorney's fees to a prevailing party. The logic of those cases requiring appointment of counsel for indigent criminal defendants simply does not apply to indigent prisoners in civil rights actions as the Seventh Circuit implies.

If the opinion of the Seventh Circuit were allowed to stand, it would greatly increase the burden of an already over-taxed federal judiciary. United States Code Section 28 USC §1915(d) provides only that a court may *request* an attorney to represent an indigent plaintiff. No funds are available to the court to pay attorneys for their representation or to advance out-of-pocket expenses, such as travel or deposition expenses. The Seventh Circuit is requiring the district courts to undertake a monumental task—finding attorneys willing to represent prisoners, who as a class are notorious for their incessant lack of satisfaction with appointed counsel, in meritless or nominally meritorious claims, to underwrite these proceedings out of their own pockets, and to do so in thousands of cases. Sixteen thousand (16,000) cases were filed by state prisoners in 1981 alone. *See, McKeever v. Israel*, 689 F.2d 1315, 1323 (7th Cir. 1982).

More importantly, the Seventh Circuit's presumption in favor of appointment of counsel for indigent prisoners in civil rights suits is unjustified. Civil rights actions have a built-in incentive for attorneys to accept the meritorious case. Under 42 USC §1988, attorney's fees are available to a plaintiff who prevails in such an action. If the indigent prisoner's case has merit, he should have no problem finding an attorney to represent him. The fact of his incarceration does not prevent the indigent prisoner from presenting his case to any attorney by mail. Every prisoner

knows at least one attorney—the one who represented him at his criminal trial. He can find others by writing the local bar association or checking the state legal directory, which in Indiana is published annually.

The legitimate civil rights claim filed by indigent prisoners is protected by 42 USC §1988 and routine appointment of counsel for such cases is unnecessary. The Seventh Circuit has failed to recognize the realities and the repercussions of requiring routine appointment of counsel for indigent prisoners. The Seventh Circuit's opinion is in conflict with the decisions of the Fourth and Ninth Circuits and this important question, when appointment of counsel is necessary under 28 USC §1915(d), should be decided by this Court.

II. The Seventh Circuit Has Decided Erroneously And In A Way In Conflict With the Controlling Decisions of This Court That Medical Malpractice Standards Are Applicable To A Civil Rights Claim

This Court set the standard for medical claims under 42 USC §1983 in *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976). That standard is whether there was deliberate indifference to a serious medical need. It is a standard much higher than that necessary to prove medical malpractice. The Seventh Circuit repeatedly refers to standards of medical practice, differences of medical opinion and questions of causation (Appendix, p. 9). Those would be relevant inquiries in a medical malpractice case and such a case might indeed be too complex for lay representation. But this is a civil rights action for violation of the Eighth Amendment's prohibition against cruel and unusual punishment and the standard is deliberate indifference. The Seventh Circuit's misapplication of the deliberate indifference standard is further demonstrated in its phrasing the question as "whether defendants' conduct was an inadvertent failure to provide adequate medical care or a 'wanton infliction of

unnecessary pain'..." (Appendix, p. 9). This Court specifically stated in *Estelle v. Gamble*, *id.* at 292. "...an inadvertent failure to provide adequate medical care *cannot* be said to constitute 'an unnecessary and wanton infliction of pain'..." (Emphasis added). The opinion of the Seventh Circuit and its analysis of their *Maclin* considerations is in conflict this Court's controlling decision in *Estelle v. Gamble*, *id.*, and this Court should grant certiorari to correct that error.

III. The Seventh Circuit Has Decided Erroneously That There Is No Discretion Under Rule 39(b), Federal Rules of Civil Procedure, In Cases Involving *Pro Se* Prisoner Litigants

The Seventh Circuit has removed the discretionary provision from Rule 39(b), Federal Rules of Civil Procedure with regard to *pro se* prisoners. Rule 38(b), Federal Rules of Civil Procedure, provides that a jury demand must be made within ten days after the issues are closed and Rule 38(d) provides that if a demand is not so filed the right to a trial by jury is waived. Petitioner did not file his demand until the nineteenth day. He had waived his right. After the District Court ruled his demand untimely and *after* the case was set for trial, Petitioner moved for reconsideration and the district court denied it. The Seventh Circuit, citing *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972) found the denial to be an abuse of discretion. The Seventh Circuit is creating separate rules for *pro se* prisoners by relying on *Haines v. Kerner*. *Haines v. Kerner* does not stand for the proposition that prisoners are exempt from the Federal Rules of Civil Procedure. Petitioner's demand was untimely and it was properly denied. At the time he moved for reconsideration and the first time *Haines v. Kerner* could be properly invoked to liberally construe Petitioner's motion as one under Rule 39(b), Federal Rules of Civil Procedure, thus invoking the court's discretion, the case had already been set for trial at the District Court's Christmas term inside

the Indiana State Prison. Congestion of the court's calendar is an accepted reason for the court's refusing to exercize its discretion favorably under Rule 39(b). *Wilson v. Corning Glass Works*, 195 F.2d 825 (9th Cir. 1952). The court must be allowed to control its own docket. The Seventh Circuit has erroneously used this Court's decision in *Haines v. Kerner* to create discretion where none exists—under Rule 38—and to remove the exercize of discretion from the District Court where it does exist—under Rule 39(b)—in cases involving *pro se* prisoners. This Court should grant the petition for certiorari to correct this fallacy on the part of the Seventh Circuit.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 2, 1983

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

BILLY MERRITT,	) Appeal from the
	) United States District
Plaintiff-Appellant,	) Court for the
	) Northern District
No. 81-1136 vs.	) of Indiana,
	) South Bend
GORDON H. FAULKNER, *et al.*,	) Division.
	) No. 880-0207
Defendants-Appellees.	) Allen Sharp, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellees Gordon Faulkner, a vote of the active members of the Court was requested, and a majority* of the active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Circuit Judges Posner and Coffey voted to grant the petition for rehearing *en banc*.

Opinion by Judge Swygert
Judge Cudahy concurring
Judge Posner concurring in part and dissenting in part.

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 6, 1983.

Before

Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

BILLY MERRITT,	)	Appeal from the
	)	United States District
Plaintiff-Appellant,	)	Court for the
	)	Northern District
No. 81-1136 vs.	)	of Indiana,
	)	South Bend
GORDON H. FAULKNER, *et al.,*	)	Division.
	)	No. 88-C-0207
Defendants-Appellees.	)	Judge Allen Sharp

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and the case REMANDED in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1136
BILLY MERRITT,

Plaintiff-Appellant,

v.

GORDON H. FAULKNER, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
Civil No. S80-0207—**Allen Sharp**, *Judge*.

ARGUED SEPTEMBER 24, 1982—DECIDED JANUARY 6, 1983

Before SWYGERT, *Senior Circuit Judge*, and CUDAHY and POSNER, *Circuit Judges*.

SWYGERT, *Senior Circuit Judge*. This appeal primarily concerns the right to appointed counsel and the right to a jury trial of an indigent prisoner who seeks relief for the alleged deliberate indifference of prison officials to his serious medical problems. The district court denied the prisoner's request for appointed counsel, as well as his motions for a jury trial, appointment of an independent medical expert, and enforcement of a subpoena. After trial, the district court found for the defendants. We find that the denials of the motions for appointed counsel and for a jury trial were abuses of discretion.

I

On July 10, 1978, Billy Merritt, a prisoner at the Indiana State Prison, injured his left eye. He complained of blurred vision and was seen, two days later, by Dr. Saylors, a physician on the prison staff. Saylors could not determine whether there was any damage to the eye, but he felt the complaint was serious enough to act on it promptly. He referred Merritt to the prison consultant ophthalmologist, Dr. Houck. Saylors indicated in Merritt's file that the matter was "urgent."

Houck, examining Merritt the next day, found that Merritt had a vitreous hemorrhage in the left eye. About a month after the accident, Houck arranged for Merritt to be tested for sickle cell disease. The test was positive. Houck thought there might be a relationship between the sickle cell disease and the hemorrhaging in the left eye, but he did not know anything about the treatment of sickle cell disease. Houck examined Merritt three times during the next three months, but he did not prescribe any treatment or make any referrals. Saylors described Houck's handling Merritt's medical condition as "unusual." Five months after the injury, in December 1978, Houck referred Merritt to a consulting surgeon for consideration of a vitrectomy, an operation which could remove fluid from Merritt's left eye.

Six weeks later, and more than six months after the accident, Merritt was send to an Indianapolis hospital for treatment of his left eye. The surgeons at the hospital did not perform a vitrectomy on the left eye. Instead, they performed an argon laser photocoagulation on Merritt's *right* eye, even though his vision in his right eye was 20/25 and he had never complained about his right eye. Following his trip to the hospital, Merritt's vision in his right eye deteriorated, and he became functionally blind in both eyes.

Merritt was examined by Houck about once a month during the next year. Merritt returned to the hospital once

and also went to an Indianapolis clinic for further tests and evaluations. No treatment or operation was prescribed by Houck or the physicians at the hospital or clinic. During this period Merritt, however, was examined by another prison staff physician. This physician noted that Merritt's left eye was still hemorrhaging. Although this doctor referred Merritt to the prison's assistant administrator of medical services for treatment, including surgery, no other operation was performed.

II

On July 7, 1980 Merritt filed his complaint seeking declaratory and injunctive relief and compensatory and punitive damages for violation of his eighth amendment right.[1] His motion to proceed *in forma pauperis* pursuant to 28 U.S.C. §1915 (1976) was granted. The defendants answered by generally denying Merritt's substantive allegations and raising as affirmative defenses that they acted in good faith and that Merritt's blindness was caused by sickle cell disease.

On August 13, 1980 Merritt moved for appointment of counsel. On October 30, 1980 the district court had not ruled on this motion, and Merritt moved for appointment of two prison inmates as lay assistants, expressly stating that the lay assistants did not take the place of appointed counsel. This motion was granted. On December 15, fifteen days before trial, Merritt's motion for appointed counsel was denied. In its order, the court ruled: "The appointment of counsel in a civil action is a matter within the discretion of the district court. It is a privilege and not a right."

[1] The defendants were: Gordon Faulkner, Commissioner of the Indiana Department of Corrections; Jack Duckworth, Warden of Indiana State Prison ("ISP"); Ronald Freake, ISP Hospital Administrator; Dr. John Saylors, ISP Chief General Physician; Dr. O. D. Reed, ISP Optometrist; Dr. R. S. Houck, ISP Opthalmological Consultant; and Dr. Nghia Mai, ISP General Physician.

On August 26, 1980, nineteen days after the defendants had answered the complaint, Merritt made a demand for jury trial pursuant to Fed.R.Civ.P. 38(b). The demand was stricken as untimely on October 1. Merritt moved for reconsideration explaining that he was blind, and that, because he had to rely on a lay advocate to present motions to the court, his failure to make a timely jury demand was excusable. The motion for reconsideration was denied the next day.

Trial was held on December 30, 1980. Merritt presented evidence through nine witnesses, three of whom were the defendants. The court entered judgment for the defendants at the close of trial, based upon oral findings of fact. Merritt appealed to this court and counsel was appointed to represent him here.[2]

III

Indigent civil litigants have no constitutional or statutory right to be represented by a lawyer. Nevertheless, particularly when rights of a constitutional dimension are at stake, a poor person's access to the federal courts must not be turned into an exercise in futility. *See Bounds v. Smith*, 430 U.S. 817, 821-24 (1977); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). This principal of meaningful access is reflected in many decisions by the United States Supreme Court and by this court. Congress, in 28 U.S.C. §1915 (1976), has indicated that the federal courts must be a judicial forum truly available to the rich and poor alike.

In some civil cases meaningful access requires representation by a lawyer. In *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), Justice Sutherland observed that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has

[2] The court wishes to thank attorney Joel M. Hellman for his assistance.

> small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [sic] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more is it of the ignorant and illiterate, or those of feeble intellect.

The logic which propelled the Supreme Court to move from *Powell* (right to counsel in capital prosecutions), to *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in all felony prosecutions), to *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel in cases in which the defendant receives a prison sentence), is no less compelling when applied to these cases.

Even when there is no absolute right to counsel, *see, e.g., Scott v. Illinois*, 440 U.S. 367, 369 (1979) (no right to counsel when potential prison sentence is not actually imposed), the Court has made it clear that the circumstances of a particular case may make the presence of counsel necessary. In *Gagnon v. Scarpelli*, 411 U.S. 778, 787-91 (1973), for example, the Court found no absolute right to counsel in parole revocation proceedings. Nevertheless, a flexible case-by-case approach to the question of appointed counsel sensitive to the ability of the parolee to present his case was constitutionally necessary. *Id.*

One important reason for representation by counsel is ensuring the efficacy and accuracy of the factfinding process. *See Scarpelli, id.* Quite often the factual and legal issues in a civil case are more complex than in a criminal

case. *See* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L. J. 545, 548 (1967). This often will be true in cases presenting constitutional questions. Indeed, surviving a critical motion to dismiss under Fed. R.Civ.P. 12(b)(6) may well dependent upon the ability to perform legal research and present sophisticated legal arguments in such doctrinally complex areas as prisoner medical rights or free speech. These are skills which a layman often may not have and in which a lawyer receives professional training.[3]

IV

It is within this context that this circuit has fashioned standards for the exercise of discretion in considering whether to appoint counsel for indigent civil litigants in the federal courts under 28 U.S.C. § 1915(d) (1976).[4] In *Maclin v. Freake*, F.2d 885 (1981) *(per curiam)*, we set forth and applied five nonexclusive factors which a district court should consider in ruling upon such a request. *See also McKeever v. Israel*, ___ F.2d ___, slip op. No. 80-2785 (7th Cir. Sep. 29, 1982). These factors are: (1) whether the merits of the indigent's claim are colorable; (2) the ability of the indigent plaintiff to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint. *Maclin*, 650 F.2d at 887-89.

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[3] The problem is compounded by the inequality which results when the defendant, most often the state, is represented by counsel and the indigent civil litigant is not. An underlying assumption of the adversarial system is that both parties will have roughly equal legal resources. This assumption is destroyed when only one side is represented. *See Bounds v. Smith*, 430 U.S. 817, 826 (1977).

[4] Section 1915(d) provides in relevant part: "The court may request an attorney to represent any such person unable to employ counsel..."

Analysis of these five factors indicates that the district court abused its discretion when it denied Merritt's request for appointed counsel. First, Merritt has presented a colorable claim for relief. One of the chief questions in this case can be phrased in many ways: (1) whether the defendants acted with deliberate indifference to Merritt's serious medical needs, (2) whether defendants' conduct was an inadvertent failure to provide adequate medical care or a "wanton infliction of unnecessary pain," or (3) whether defendants acted in conscious disregard of Merritt's medical needs. *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976); *Wood v. Worachek*, 618 F.2d 1225, 1232-33 (7th Cir. 1980); *Green v. Carlson*, 581 F.2d 669, 675-76 (7th Cir. 1978); *aff'd*, 446 U.S. 14 (1980).

Merritt alleged that he received no treatment for six months after the injury to his eye, that the prison officials interfered with his ability to receive proper treatment, and that the defendants' conduct resulted in his blindness. If Merritt had been able to prove these allegations, he would have shown a violation of his eight amendment rights, and he would have been entitled to relief. In *Duncan v. Duckworth*, 644 F.2d 653 (7th Cir. 1981), we considered a claim similar to Merritt's. Duncan had complained of severe pain from an injury, and although he was seen repeatedly by prison doctors, no surgery or treatment was provided. The *Duncan* court ruled that despite the fact that the *pro se* prisoner's complaint failed to use the key legal phrases, the prisoner had presented a colorable claim and dismissal by the district court for failure to state a claim was improper. *Id.* at 654-55.

Second, Merritt is unable to investigate crucial facts. The crucial facts here concern both the conduct of the defendants, the cause of Merritt's blindness, and the standards of medical practice in such areas as the treatment of sickle cell disease and blindness. Consultation with outside medical specialists to develop evidence concerning diagnosis, causation, treatment, and prognosis

is obviously beyond the capacity of this blind, indigent, and imprisoned litigant. *See Maclin, supra*, 650 F.2d at 889.

Third, the nature of the evidence is such that the truth will more likely be exposed when both sides are represented by counsel. When properly presented the evidence in this case will consist of quite complex and probably contradictory evidence from medical experts, the plaintiff, and the defendants. Testing their opinions and their credibility will require the skills of a trained advocate to aid the factfinder in the job of sifting and weighing the evidence.

Fourth, neither Merritt nor his lay assistants could present this case properly. The defendants here do not contend that Merritt himself could present his case. How could Merritt read the defendants' documents indicating the results of their examinations of him? Rather, defendants argue that Merritt's two prisoner-lay assistants were competent. The lay assistants, however, were also handicapped by their inability to obtain essential medical evidence from doctors outside of the prison. Depositions as a means of obtaining evidence from such witnesses were avenues completely foreclosed to Merritt and his lay assistants. This was especially critical because the only physicians other than the defendants who examined Merritt were beyond the subpoena power of the court. See Fed.R.Civ.P. 32(a)(3). Moreover, the trial transcript reveals how well meaning but, nevertheless, incompetent the lay assistants were. Cross-examinations of critical witnesses were often muddled and ambiguous. It is obvious that the lay assistants had little understanding of the hearsay rule or of how to present a closing argument. In some cases these skills will be less critical. But here, where complex medical evidence is at the heart of a case, these skills were essential.

Fifth, the legal questions raised by Merritt's complaint, the cause of his blindness and whether defendants acted with deliberate indifference to his injury, are too complex

for lay representation. These questions depend upon the subtle appreciation of legal causation and of the duties imposed upon state prison officials by the eighth and fourteenth amendments, an appreciation which neither Merritt nor his lay assistants possessed.

In addition to satisfying the *Maclin* standards on Merritt's most straightforward claim, a careful review of the transcript below reveals a second possible claim, one perhaps more substantial. The transcript reveals that the prison medical authorities were aware of their deficiencies in treating sickle cell disease before Merritt's injury. Recommendations for staff training and equipment had been made to improve the capability of prison medical authorities to treat black inmates suffering sickle cell disease. We, of course, cannot say whether the failure of prison medical officials to act upon these recommendations comprises, in part, a violation of Merritt's eighth amendment rights. But we are sure that presentation of such a claim, in its novelty and complexity would require the assistance of counsel.

V

We have not answered explicitly the question of whether it is proper and wise for the court of appeals to remand this matter to the district court for the exercise of its discretion. *See McKeever, supra*, slip op. at 17 (Posner, J., dissenting); *Ray v. Robinson*, 640 F.2d 474, 478 (3d Cir. 1981); *Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978); *United States v. McQuade*, 579 F.2d 1180, 1181 (9th Cir. 1978). The alternative course, followed in *Maclin* and *McKeever*, is to reach the merits of this prisoner's claim for appointed counsel.

We conclude that under the circumstances of this case it is inefficient and unjust to remand the matter to the district court. The facts here are not in dispute and the issue is fully briefed. The only step remaining is the application of the

Maclin legal standards to these facts,[5] a task for which our expertise is as great as the district court's. Conceptually this task is similar to considering summary judgment. As demonstrated in Part IV, *supra*, failure to appoint counsel would so clearly be an abuse of discretion that deferral to the district court is unncessary. The delay and multiple litigation of this issue would not service the interests of the litigants or of the federal courts. *See* 28 U.S.C. §2106 (1976); *Grosso v. United States*, 390 U.S. 62, 71-72 (1968); *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *Ferrero v. United States*, 603 F.2d 510, 515 (5th Cir. 1979); *In re Hronek*, 563 F.2d 296, 298 (6th Cir. 1977).

VI

The next question is whether the district court abused its discretion when it denied Merritt's jury demand. The defendants argue that denial was proper because Merritt's motion invoked Fed.R.Civ.P. 38(b).[6] Because the rule's ten-day limitation period has passed (by nine days), Merritt had failed to fulfill the rule's mandatory requirements.

Haines v. Kerner, 404 U.S. 519 (1972), and the importance of the right to a jury provision of the seventh amendment indicate that it was an abuse of discretion to deny Merritt's motion. Under *Haines pro se* pleadings are to be liberally construed. Merritt's motion should have been

[5] This distinction may explain the difference between this circuit's treatment of section 1915 appointment of counsel claims in *Maclin* and *McKeever* and appellate treatment in *McQuade* and *Ray*, *supra*. The *McQuade* and *Ray* courts did not formulate standards for the exercise of discretion under section 1915.

[6] Fed.R.Civ.P. 38(b) provides, in relevant part:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

treated under Fed.R.Civ.P. 39(b).[7] Rule 39(b) grants wide discretion to the federal courts in considering untimely jury demands. That discretion must be exercised in the context of the interest asserted. A jury trial is not a minor feature of our judicial system. The right of a litigant to have his fellow citizens hear and weigh the evidence is a hallmark of our jurisprudential system. *Swofford v. B. & W., Inc.*, 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965). *See generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-344 (Rehnquist, J., dissenting) (history of constitutional right to jury trial).

In the absence of strong and compelling reasons to the contrary, untimely jury demands should be granted. *Swofford, supra*, 336 F.2d at 409. The exercise of discretion requires an analysis of the facts of the particular case. As one commentator has noted, "[t]he court ought to approach each application under Rule 39(b) with an open mind and an eye to the factual situation in that particular case." 9 C. Wright & A. Miller, *Federal Practice & Procedure* §2334, at 116 (1971). The mere fact, however, that plaintiff's motion for a jury trial was "too late" is neither a strong nor a compelling reason to deny the fundamental right to a jury trial. *Hensley v. Ellenburg*, 57 F.R.D. 212 (E.D. Tenn. 1972). Untimely jury demands have been granted in a variety of circumstances. *See Ford v. Breier*, 71 F.R.D. 195 (E.D. Wis. 1976) (motion for jury trial granted where it was brought by new counsel without delay and was unopposed); *United States v. Mesna*, 11 F.R.D. 86 (D. Minn. 1950) (motion for jury trial granted where it was only two and one-half months late and opponent would suffer no prejudice); *Arnold v. Trans-American Freight Lines*, 1 F.R.D. 380 (W.D. Mich. 1940) (motion for jury trial granted where

[7] Fed.R.Civ.P. 39(b) provides:

> Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the Court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the Court in its discretion upon motion may order a trial by a jury of any or all issues.

See also Fed.R.Civ.P. 6(b).

failure to make jury demand was the result of confusion among counsel).

There are no strong or compelling reasons for denying Merritt's motion for a jury trial. The defendants rely upon cases which hold that mere inadvertence of counsel is not enough to support a rule 39(b) motion. *Bush v. Allstate Ins. Co.*, 425 F.2d 393, 395-96 (5th Cir.), *cert. granted*, 400 U.S. 833 (1970); *Noonan v. Cunard Ins. Steamship Co.*, 375 F.2d 69, 70 (2d Cir. 1967); *Todd v. Lutz*, 64 F.R.D. 150, 152 (W.D. Pa. 1974); *A. & W. Oil Co. v. Texaco, Inc.*, 51 F.R.D. 283, 286 (W.D. Ark. 1970). But this is not a case of mere inadvertence of counsel. This motion was made by a blind *pro se* litigant who indicated from his first pleadings, through his requests for counsel, that he did not feel competent to represent himself in court.

Defendants' alternative argument is that the motion was properly denied because of court congestion. In *Wilson v. Corning Glass Works*, 195 F.2d 825, 827 (9th Cir. 1952), defendants' authority for this proposition, the plaintiff was represented by counsel, the bench trial date was already set before the motion was made, and the district court was severely overworked and understaffed. *Wilson* is inapposite. Here a *pro se* litigant's motion was made more than one month prior to the assignment of a trial date. (Both the denial of the August 26 motion for a jury trial and the trial date were set on October 1.) The mere fact that it was more convenient for the district court to hear Merritt's claim at a bench trial during its previously scheduled Christmas term at the prison is not the sort of strong and compelling reasons which rule 39(b) requires. Regardless of location, bench trials are always more convenient. Under defendants' reasoning rule 39(b) would be a nullity.

VII

Merritt raises two additional objections to the proceedings below. The first concerns the district court's refusal to order a medical examination by an independent

physician, pursuant to Fed.R.Civ.P. 35(a).[8] The primary thrust of the claim appears to concern the payment of the medical experts' fees. Merritt recognizes that the claim is novel. It is unwise to reach this issue now. At his new trial, Merritt will be represented by counsel who has a variety of options unavailable to Merritt, including depositions and contingency fee or pro bono services by physicians. Only when these more traditional avenues have been pursued would it become necessary to consider under which circumstances a court can or should appoint a medical expert for an indigent litigant.

The last objection concerns the district court's refusal to enforce a subpoena. The district judge denied the motion for enforcement because Merritt could not pay the witness fees. The question of whether and when the funds for witness fees must be advanced to a federal civil indigent litigant is not a simple one. 28 U.S.C. §1915(c) (1977)[9] may provide a basis. See *Morrow v. Igleburger*, 584 F.2d 767 772 n.7 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *Marks v. Calendire*, 80 F.R.D. 24, 27 (N.D. W.Va. 1978). The record and the briefs are insufficient for us to reach this matter. Again, we trust that appointed counsel will be able to find an alternative solution to this problem or create a record and present arguments indicating the bases and sources for an advancement of witness fees and why the subpoena should be enforced.

The judgment of the district court is hereby reversed. This cause is remanded for a new trial in which a jury and

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[8] Fed.R.Civ.P. 35(a) provides in pertinent part:
When the mental or physical condition . . . of a party, or of a person in the custody or legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control.

[9] Section 1915(c) reads in pertinent part: "Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases."

appointed counsel are provided to the plaintiff-appellant. Circuit Rule 18 will apply.

CUDAHY, *Circuit Judge*, Concurring:

The question of appointment of counsel in this case is close, not because I am convinced that the plaintiff does not have a promising malpractice case,[10] but because the plaintiff may have difficulty in successfully bringing his proof within the Eighth Amendment.[11] Nonetheless—and particularly since we are dealing here with a blind man—Judge Swygert's analysis of the *Maclin* factors is entirely persuasive.[12]

But I write separately by way of comment on Judge Posner's economic analysis in this case and in his dissent in *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982). First, I cannot agree that the plaintiff, who complained of blurred vision in his left eye, had surgery on his good right eye and is now blind in both eyes, would have no chance in a malpractice case before a jury. Even if, as the dissent suggests, the plaintiff's medical care was "solicitous," it is not readily apparent to me why a jury could not find that someone had made a mistake and award generous damages. At least, I suspect that a man who became blind after medical procedures, but not in prison, might have had little difficulty in acquiring a lawyer on a contingent fee basis.

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[10] It is true that Judge Sharp said at one point that he would direct a verdict if this were a malpractice case, but he also said, "The question in this case is not whether there was medical malpractice, the question here is whether or not there was by any of the defendants a deliberate indifference to serious medical needs." Appellants' App. at D-8. I do not believe it can be said that Judge Sharp made a "finding" about medical malpractice.

[11] The evidence that the prison medical authorities were aware of their deficiencies in treating sickle cell disease before Merritt's injury may fortify the Eighth Amendment claim.

[12] I also note that this case appears to be controlled by our recent decision in *McKeever*. If anything, the defendant in this case has a much stronger claim, based upon the *Maclin* test, to having an attorney appointed to represent him than did the defendant in *McKeever*. *McKeever* is the law of this circuit, and it clearly mandates the result which was reached today.

Perhaps, however, the laws of economics take a different turn when prison walls intervene. Not entirely facetiously, it occurs to me that the barriers to entry into the prison litigation market might be very high. I think our knowledge of the state of effective competition among attorneys for the business of prisoners with legal claims is slight. Hence, I am not prepared to consign to the verdict of the marketplace the issue of prisoner representation; and this is, of course, not the law.

The dissent suggests that the court's furnishing the plaintiff with the names of lawyers in the area might be a suitable substitute for appointment of counsel. But is an incarcerated blind man in a position to take advantage of such information? Are prison authorities prepared to facilitate (or the bar associations to tolerate) the solicitations of prisoners by hungry lawyers waving contingent fee contracts? And are the prison authorities ready to accept a system of representation which would make demands for substantial damages *de riguer?*

If there are real economic opportunities for lawyers in representing prisoners, then one appointment to such a task might open the door to later remunerative activity within prison walls. Perhaps appointment in such circumstances is not such a hardship after all.

In any event, justice demands that, in some cases, representation be supplied. I agree that these cases should be carefully limited. But we cannot assume that all prisoners' suits are unmeritorious, and we should resolve any doubts in favor of a prisoner whose complaint is blindness. If we are to assume the prisoners' suits are universally unmeritorious, the *Maclin* factors would not require appointments in virtually any set of circumstances. The fact is that a number of claims by prisoners may be important and meritorious, but may not call for copious damages. In these cases, in the probably typical situation of poor communication between prisoners and nearby lawyers, in the perhaps not atypical situations where even

hungry lawyers may want more compensation than prisoners can provide and in certain other situations, appointment of counsel, subject to the *Maclin* factors, is still the preferable approach. I am sure we would all be pleased by a self-financing system of justice providing effective access to the courts even within prisons. But I see no immediate prospect of justice being entirely a function of a market theory which may bear little relation to the reality of the prison setting. Therefore, I think it is appropriate here simply to apply the *Maclin* factors and appoint counsel.

POSNER, *Circuit Judge*, concurring in part and dissenting in part. I agree that it was an abuse of discretion for the district judge to deny Merritt's untimely request for a jury trial. A prisoner not represented by counsel, even one assisted as here by "lay advocates" (also known as "jailhouse lawyers"), is entitled to every indulgence in the court's procedural rulings. See *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982). This is the corollary to a policy, which I favor, of not appointing counsel in civil cases except in the most unusual circumstances. It is unfair to deny a litigant a lawyer and then trip him up on technicalities. I doubt, though, that this case will go to trial again. Probably the defendants will move for summary judgment; and for reasons to appear in a moment, probably the motion will be granted.

I disagree, however, that it was an abuse of discretion for the district court not to appoint counsel for Merritt. For reasons explained in my dissenting opinion in *McKeever v. Israel*, 689 F.2d 1315, 1324-25 (7th Cir. 1982), I believe the presumption should be against appointment of counsel in prisoner civil rights cases. One of the reasons given in my dissent in *McKeever* is especially applicable to this case. I said that a prisoner who has a good damages suit should be able to hire a competent lawyer and that by making the prisoner go this route we subject the probable merit of his case to the test of the market. Merritt alleges that the

defendants are legally responsible for his blindness. If this were so, he would have a case that was attractive to many personal-injury lawyers, even apart from the fillip of an award of attorney's fees if the plaintiff prevails that 42 U.S.C. §1988 adds almost as a matter of course (see *Kerr v. Quinn*, No. 82-7244 (2d Cir. Nov. 4, 1982)) when a personal-injury case is brought under one of the civil rights acts. If Merritt cannot retain a lawyer on a contingent fee basis the natural inference to draw is that he does not have a good case.

It is reasonably clear to me that he does not have a good case, so I am not surprised that he did not find a private lawyer willing to represent him. The pathetic facts recited in the majority opinion are not the facts found below. They are the facts Merritt would have liked the district court to find. The district court found that the cause of Merritt's blindness was and remains unknown, that he received continuous, competent, and in fact solicitous medical care, some of it at an outstanding university hospital, and that if this were a medical malpractice case the defendants would be entitled to a directed verdict in their favor. *A fortiori*, Merritt failed to prove a "deliberate indifference" to his medical needs, as would be necessary to show a violation of the Constitution and hence of 42 U.S.C. §1983, the civil rights statute under which this suit was brought. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). As Merritt's appeal does not challenge the district court's findings, we ought not adopt a version of the facts that the district court rejected. And we ought not draw inferences so fanciful that Merritt's court-appointed counsel in this court does not so much as hint that they might have any basis in fact. I refer to the court's suggestion that the prison officials may have known that their medical facilities were inadequate yet failed to take steps to remedy this deficiency.

The majority regards the right of an indigent prisoner to appointment of counsel in a civil case as a natural, maybe inevitable, outgrowth of the Supreme Court's decisions

entitling indigent criminal defendants to assistance of counsel. But all other differences between the civil and criminal settings to one side, a plaintiff in a damages case has better access than a criminal defendant to the private market in lawyers. The criminal defendant does not get a sum of money out of which he can pay his lawyer if he wins. But a prisoner who can prove he was wrongfully blinded can look forward to a very big money judgment to share with his lawyer and to an award of attorney's fees under section 1988 besides. I do not think we need worry that a prisoner who has a good case will have difficulty getting the name of a lawyer. Merritt himself had the name of a lawyer—he moved for the appointment of a specific lawyer. If Merritt had had a good case this or another lawyer would have been happy to handle it on a contingent-fee basis, with the prospect of an award of attorney's fees under 42 U.S.C. §1988 as an additional inducement. The picture of a blind man in hopeless quest of a lawyer who will handle his pitiable cause is not realistic. Every prisoner knows at least one lawyer: the lawyer who represented him at his criminal trial. Every prisoner has access to the jailhouse lawyers, who can put him in touch with lawyers on the outside. There is no suggestion in this case that Merritt in particular or prisoners in general have difficulty getting the names of lawyers; but if they do, let us order the district judges to supply them with names; let us not decree a lawyers' draft.

I said in my *McKeever* dissent that I was afraid that our circuit is moving toward routine appointment of counsel in prisoner civil rights cases. This case takes us another step down that road. The district judge in this case unlike the judge in *McKeever* exercised his discretion on the question whether to appoint counsel. But that exercise is given no weight. The panel substitutes its own judgment; it honors the abuse of discretion standard *(Maclin v. Freake*, 650 F.2d 885, 886 (7th Cir. 1981) (per curiam)) in the breach. Although it lists five reasons why it would be an abuse of discretion not to appoint counsel to represent Merritt, four

ring changes on the same theme: the complexity of the issues. (The fifth is that if the allegations of the complaint are correct Merritt has a good case. This will be true in every case where the complaint states a cause of action under federal law.) The complexity stems from the fact that the issues are medical, and hence technical. Thus the analysis in the majority opinion implies that a prisoner is entitled to appointment of counsel in any personal-injury case where a medical issue is raised.

The court states: "An underlying assumption of the adversarial system is that both parties will have roughly equal legal resources." This has never been an assumption of the adversarial system. We do not put a cap on the amount of money that a litigant can spend on lawyers; we do not inquire whether the litigants had roughly equal legal resources; we allow one to outspend the other by as much as he pleases. We count on the courts not to be overawed by the litigant with the higher-priced counsel. But, whether it is right or wrong, the goal of equalizing legal resources implies, I admit, that every indigent civil litigant should have, at the very least, counsel appointed for him; and I worry that this proposition may be the unstated premise of the majority opinion—the stated but unsupported premise of which is that Merritt had a good case yet, mysteriously, could not find a lawyer to represent him.

We are embarking on a program of appointing counsel for prisoners as a matter of course in civil cases without even considering the practical consequences. We ought to consider the burden on the bar in areas—most of which are not populous, and do not have large numbers of lawyers—where the major prisons in this circuit are located, such as Michigan City, Indiana, where Merritt is imprisoned; and we ought to consider the potential impact on the dockets of our busy district courts, and ultimately on our crowded docket, of "lawyerizing" prisoner civil litigation. I do not find a consideration of these issues in the majority or

concurring opinion. We cannot expect Congress to dress the federal judiciary's self-inflicted wounds.

The fact that Merritt is blind, though it contributes to the pathetic aura that the majority opinion radiates and though it is seized upon by the concurring opinion as a fact to distinguish this from the myriad other cases controlled by the logic of the majority opinion, has no relevance to the issues in this case—except, as I have emphasized, that it implies that Merritt could have hired a lawyer if he had had a good case in law. The lay advocates provided his eyes, and more: a blind prisoner represented by two lay advocates is better able to present an effective case than a prisoner who can see but, not being assisted by lay advocates or anyone else, must present his case by himself.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court

FOR THE

NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CIVIL ACTION FILE NO. S80-0207

BILLY MERRITT	)	
	)	
vs.	)	JUDGMENT
GORDON H. FAULKNER, JACK	)	
DUCKWORTH, RONALD FREAKE,	)	
DR. JOHN STREFLING, DR.	)	
ROGER SAYLORS, DR. O.D.	)	
REED, DR. R.S. HOUCK,	)	
DR. NGHIA MAI	)	

This action came on for trial before the Court, Honorable ALLEN SHARP, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the Plaintiff, BILLY MERRITT take nothing by his complaint with each party to bear its own costs.

Dated at South Bend, Indiana, this 30th day of December, 1980.

RICHARD E. TIMMONS
Clerk of Court

STEPHEN R. LUDWIG
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BILLY MERRITT,	)	
	)	
Plaintiff	)	
	)	
-vs-	)	CAUSE NO. S80-207
	)	
GORDON FAULKNER, et al.,	)	
	)	
Defendants.	)	
.....	)	

Transcript of proceedings had in the above-entitled matter before the HON. ALLEN SHARP, UNITED STATES DISTRICT JUDGE, Indiana State Prison at Michigan City, Indiana, on Tuesday, December 30, 1980, commencing at approximately the hour of 2:30 o'clock P.M.

APPERANCES:

GEORGE MOON,
and
MARK FAUNTLEROY,
Lay Assistants,
Indiana State Prison
Michigan City, Indiana

appearing on behalf of the Plaintiff;

SABRA WELIEVER,
and
JOHN SHOEMAN,
Deputy Attorney General,
Indianapolis, Indiana

appearing on behalf of the Defendants.

The COURT: Thank you. I want to compliment, particularly the person that made the final argument, in terms of his ability and his articulateness in presenting this claim, and apparent knowledge of the record.

It's not unusual for cases in which lawyers are involved, when you've got the kind of records that you've got here, for a lawyer and others to paw around over the records quite a bit, and that's been done here, but it's nothing unusual.

I think the issue has been well presented, and in the light certainly most favorable to the plaintiff.

There is a lot of record here, and I had the benefit of the overnight review of it, and having it with me, so I'm fairly familiar with what is in these records. I certainly don't pretend to know every comma and every word, but I'm reasonably familiar. I'm not a neophyte in the area. As a lawyer I used to handle some personal injury cases, including some malpractice cases. As a Court of Appeals Judge I got into malpractice and personal injury cases very, very much, and I've tried literally hundreds of personal injury and malpractice cases, as well as cases under 1983.

If this were a medical malpractice claim or case under the law of the State of Indiana, and giving it the light most favorable to the plaintiff at the point when the plaintiff rested, I would be compelled to direct a verdict under the law of the State of Indiana against the plaintiff and for the defendant. I believe the law of Indiana is clear on the subject that the record would not permit any other result.

Now, the basic case is *Estelle v. Gamble*. I've quoted from it, and I don't need to quote from it again. There are other cases following it, but they all say substantially the same thing.

Under medical malpractice, under 1983, under *Estelle v. Gamble*, and its progeny, certainly no doctor can, should, or does, or is required to guarantee a cure.

One has to be very sympathetic with this plaintiff who has lost his sight, at least for the time being, and, frankly, I think it's optimistic to expect it to improve, but this is only my impression and the doctor's impression might be different.

And I don't think that it matters, for my purpose and for these purposes here, as to whether or not the condition of his blindness resulted from the injury from a disease or, indeed, from a combination of the two. It's well known, it's well recognized, that medicine is not exact science, never has been, and I dare say it never will be. Incidentally, neither is law. There is no guarantee. There cannot be under a human medical system that any form of medicine is going to guarantee a cure. The law doesn't require it; common sense doesn't require it.

The question is in this case not whether there was medical malpractice, the question here is whether or not there was by any of the defendants a deliberate indifference to serious medical needs.

Now there isn't any question that the record is replete with a serious medical condition. Dr. Saylors has indicated it, and others have inferred it that anytime a person says to a doctor that he is having trouble with his vision, that is a serious problem, by definition. It's, obviously, a serious problem here.

The question is whether or not any of the defendants, the medical defendants, as well as the non-medical defendants, were deliberately indifferent to serious medical needs. And I find that they were not.

I think the record is as clear as it can be that those things that were thought to be medically necessary were done. They were done promptly.

Now, the business about five weeks, there was a lot of things going on in this case during a stretch of time. There were surgeries, and, as a matter of fact, certain the cataract operation is a red herring that has no relevance at all to this

case. I think the doctor explained that—testified about it. I credit it, and I believe it, and it's undisputed. At a point in time he got two patients mixed up. He caught it, immediately corrected it, and that was the end of it.

But his testimony back of that is that this wasn't a cataract problem; never was a cataract problem. It would have been an extreme disservice. If, in fact, the cataract operation had been performed, Mr. Merritt would probably have had a good medical malpractice claim and he would be in here with something real to talk about, because the evidence is—and it's beyond dispute from the doctors—that no cataract implication was involved in this case. And to perform a cataract surgery would have been an infinitely greater mistake than was made. The mistake was made, it was corrected, it has no permanent effect. It doesn't indicate any deliberate indifference of any kind. It might have indicated a deliberate indifference if the doctor hadn't immediately caught it, but he did.

Certainly the most that can be said here—and I don't want to be unkind to anybody; that's not my desire here at all—but the most that can be said in fairness is that there is an honest difference of opinion between Mr. Merritt and the doctors as to what kinds of treatment might have brought different results.

When you look at all the different doctors and all the different medical institutions that saw this man over a relatively brief period of time, I doubt very much if had he been on the street that he would have gotten that kind of medical attention that quick. Now, that's only a thought. There is no proof of that. It's just a conclusion on my part.

The medical facilities at the Indiana University in Indianapolis, which I think I can take judicial notice of the fact that they enjoy, indeed a national, and indeed a worldwide reputation in many areas. It's a matter of local pride that I say that, but it is a fact, I think, that those facilities and the people there are well regarded, and it is to

those defendants that are responsible for Mr. Merritt going there. They did see him, they did make recommendations, and as I understand it, the recommendations were carried out.

As far as I can tell there is no—other than the cataract thing, which is an aberration that is irrelevant. As I understand it, there is no recommendation by any medical person in this case for any kind of surgery that has not been performed, nor a suggestion that, indeed, surgery would alleviate this terrible disability that Mr. Merritt has.

The doctors, I think, have testified honestly. I heard them. And they have said: "We think so, but we're not always sure." And that's honest. The doctors have indicated that they do not think that the trauma of the accident triggered the condition, but they're not totally sure. They can't totally rule out the accident. Of course, there is a problem between the left eye and the right eye, and that problem.

The burden here is rather clear, and I would like to cite a couple of cases that I think relate to this very kind of thing, and I believe they are post *Estelle v. Gamble* cases.

Estelle v. Gamble, as I recall, was decided in 1977—1976. These are after that. One that strikes me as being pretty clearly on the point is from the Eastern District of Pennsylvania. And it's Parilla, P-a-r-i-l-l-a, v. C-u-y-l-e-r, 447 Fed.Sup. 363. And it was dismissed on the pleadings—which did not occur here—but, nonetheless, the plaintiff claimed that a doctor who examined his eyes determined that his vision would be lost unless an operation was performed. The doctor later decided that nothing could be done and the plaintiff lost the vision in one eye. The court found that one aspect of *Estelle* was satisfied by the showing that the medical need was serious, which is certainly true here. However, the complaint which named the prison superintendent did not allege that he had personally participated, and so forth.

Another eye case that I think is close that follows *Estelle*—and I'm simply going to cite it—is *Wester*, W-e-s-t-e-r, *v. Jones*, 554 F2d. 1285. It's the Fourth Circuit, 1977.

My finding is—and, of course, this is a final decision, and under Rule 50—50 or 51—these findings are under Rule 52 of the Federal Rules of Civil Procedure. There is a total failure of proof on the critical issue. And the critical issue is the deliberate indifference to serious medical needs. The key words are "deliberate indifference." There is a total lack of proof to prove deliberate indifference, and I so find. And that is the lynch pin of the entire findings and, indeed, of the entire case.

There is an abundance of proof here, both orally and in the records, that the medical people that saw this man did that which was medically necessary, and certainly none of this indicates a deliberate indifference. I frankly would have difficulty in finding what more could be done.

I think it's terribly unfortunate, and I know Mr. Merritt does too. One has to be greatly sympathetic with him. But that sympathy does not create a cause of action. Sympathy does not create a claim. We tell juries that, and judges must tell themselves that. The law can't be bent just on the basis of sympathy.

And I think he has been well served by these two gentlemen who came to court with him. They have presented his case in the best possible light, and it's simply inadequate under *Estelle v. Gamble*, as announced by the Supreme Court of the United States. So that concludes the matter.

The Court now orders the Clerk to enter judgment on the basis of the findings and the conclusions here announced in favor of all of the defendants and against the plaintiff, and the Court orders that each party will bear their own costs. No assessment of costs will be made. That is the judgment of the Court, and that concludes the matter.

MR. MOON: Your Honor—

THE COURT: No fussing. The next fuss is in Chicago.

MR. MOON: We just wanted to say we plan to appeal.

THE COURT: You have that right. Thank you, gentlemen.

(Which were all of the proceedings had on said date.)